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Supreme Court, U.S.
FILED

No. 051151

MAR 9 - 2006

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IN THE

Supreme Court of the United States

October Term, 2005

PETER PAUL MITRANO,

Petitioner,

versus

ELAINE R. WARSHELL; DEBORA A. BLAKE; MARTHA M. DAVIS; THE HONORABLE LARRY B. PLETCHER; THE HONORABLE JOHN PETER CYR; THE HONORABLE WILLARD G. MARTIN, JR., VIRGINIA L. KELLY; WILLIAM D. PHILIPS; L. JONATHAN ROSS; WIGGIN & NOURIE, P.A.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR WRIT OF CERTIORARI

Peter Paul Mitrano
Pro se
4912 Oakcrest Drive
Fairfax, Virginia 22030

Petitioner

March 9, 2006

Questions Presented for Review

1. Under the logic of our Declaration of Independence, which justified our revolution against the King of Great Britain, does a United States citizen have a lawful right to start a revolution when his constitutional rights to access to the courts are in essence denied?

2. Have the nonexistence of the rights of common and honest United States citizens (for all practical purposes) made in essence a "full circle" within our present court system when compared to the complaints stated in our Declaration of Independence?

3. Does an unmarried father have a constitutional right to the companionship, care, custody and management of his biological children that he has sired and raised?

4. Does an unmarried father have a cause of action against the respondents who interfered with the custody rights of the father?

5. Does the *Rooker-Feldman* doctrine preclude an action against respondents (except Kelly) who were not privy to a state court action?

6. Did the lower courts misapply the standards for judgment on the pleadings?

Parties to the Proceeding

The caption of this case in this Supreme Court of the United States contains the names of all parties before the United States Court of Appeals for the First Circuit. No party is a parent, subsidiary or affiliate of any company.

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IN THE

Supreme Court of the United States

October Term, 2005

PETER PAUL MITRANO,

Petitioner,

v.

ELAINE R. WARSHELL, *et al.*,

Respondents.

Peter Paul Mitrano, *pro se*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

Opinion Below

The judgment of the United States Court of Appeals for the First Circuit ("First Circuit") from which petitioner seeks certiorari appears in the Appendix hereto at page A-1. The subsequent Order issued by the First Circuit denying petitioner's petition for rehearing and suggestion for rehearing en banc appears at A-15. The Memorandum Orders of the United States District Court for the District of New Hampshire ("trial court") appear at pages A-5 and A-12. All lower court decisions are officially unreported. This petition for a writ of certiorari is related to a presently pending petition for a writ of certiorari before this Supreme Court to review a judgment of the United States Court of Appeals for the Fourth Circuit identified as *Mitrano* v. *Warshell*, No. 05-1064.

Jurisdiction

The decision of the First Circuit was entered on September 16, 2005. (A-1) A timely petition for rehearing and suggestion for rehearing en banc was filed on September 30, 2005; an Order denying the petition for rehearing and suggestion for rehearing en banc was entered by the First Circuit on December 13, 2005. (A-15) This petition for writ of certiorari was filed within ninety days of said date of December 13, 2005. This Court's jurisdiction is invoked under 28 U.S.C., § 1254(1).

Constitutional Provisions and Statutes

The Fifth and Fourteenth Amendments and Title 28 U.S.C., § 1738A.

Statement of the Case

This case arises from an action filed by petitioner, Peter Paul Mitrano, *pro se* (hereinafter sometimes referred to as "Mitrano" and/or "father"), pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, and 28 U.S.C. § 1343, seeking only money damages for the deprivation of the father's rights to raise his children. The trial court dismissed the action based upon a stated lack of subject-matter jurisdiction against all respondents except L. Jonathan Ross and Wiggin & Nourie, P.A. who were granted judgment on the pleadings in response to the respective motions to dismiss filed by the respondents.

This action is only for money damages for the outrageous actions and inactions of the respondents in interfering with the father's right to raise his children. The father has been denied the right to see his son Christopher since January 5, 2001 when the respondents Virginia L. Kelly (hereinafter sometimes referred to as "Kelly" and/or "mother") and William D. Philips ("Philips") took the child from Fairfax, Virginia for an alleged visitation on Friday, January 5, 2001 and failed to return the child on the following Monday, January 8, 2001.

As difficult as this matter has been since January 5, 2001 when the father last saw his son Christopher (note litigation commenced in 2000 and further note that a daughter reached the age of majority on October 4, 2003 and that an older son reached the age of majority on December 27, 2004), the father continues to pursue this matter in part in the hopes of sending a message on behalf of other parents.

Reasons for Granting the Petition

With all due respect, we have reached the time in the history of the United States of America in which it is necessary for this Supreme Court to remind the lower courts in plain English that one of the purposes of the lower courts is to hear the cases brought before them. With all due respect, this Supreme Court should explain in plain English that this means that the lower courts should facilitate the parties in resolving their disputes in a peaceful manner and not find a pretext to throw the cases out of court. With all

due respect, this Supreme Court should in plain and direct English remind our country and our lower courts that the alternative to the peaceful resolution of our differences through our courts is the right of the citizens of the United States of America to start a lawful revolution. Note that on page 28 of the Reply Brief for Appellant filed before the First Circuit, petitioner asked the following question:

> ". . . [W]hen the 'United States courts' close 'the doors' to the 'injured', do the 'injured' have the right to revolution under the logic of our Declaration of Independence?"

Sadly, the present question of the day is not how much justice is a citizen of the United States of America entitled to receive, but how much justice is a citizen of the United States of America able to afford? More sadly is that the various procedural rules of the courts are for all practical terms often used to keep citizens of the United States of America out of court. With all due respect, this Supreme Court is able to take judicial notice of the fact that all prior empires throughout history have at some point failed. While some may argue that the United States of America is never going to fail, it is most important that this country by and through this Honorable Supreme Court reflect and consider whether our present system of justice is serving the citizens of the United States of America in the manner that our forefathers envisioned. While the economy of our country presently proceeds under the basic economic rules of supply and demand, it is necessary for this Supreme Court to rule that the

lower courts are to protect citizens of the United States of America and not subject the administration of justice to the sometimes vulgar and sometimes uncompassionate economic rules of supply and demand. This logic happens to coincide with the principle that all men (and women) are equal under the law. Instead of showing distain for the common and honest citizen proceeding without the additional cost of legal counsel (or in legal terms "*pro se*"), the lower courts should be respectfully directed by this Supreme Court to facilitate and hear the cases of the common and honest citizen proceeding without the additional cost of legal counsel. For whatever reasons, the economic reality of the present day is that too many citizens of the United States of America are simply priced out of our system of justice. Even in a civil action, this Supreme Court is able to take judicial notice that it is most difficult to proceed without the benefit of expensive legal services. The undersigned contends that this situation will over time destroy one of the basic rights of the citizens of the United States of America and result in more unrest among the less connected citizens of the United States of America. The bottom line is what good is a legal system that the common and honest citizens of the United States of America cannot afford to utilize?

By way of analogy, when the canaries died in the coal mines, the coal miners accepted the realization that the coal miners could be the next to die. As our Governments allow the homeless to sleep and freeze to death on our streets, the poor and less connected accept the realization that

they may be the next to become homeless. As our Governments cause severe damage to the families that make our nation, families accept the realization that what was once thought to be sacred can now be taken away by the arbitrary, capricious and sometimes illegal acts of our Governments. Have we now come full circle wherein the revolution fought so bravely by our forefathers was for naught in that we are now exposed to the tyranny that our forefathers gave up their lives to stop?

Let us not forget that over two hundred years ago, on April 19, 1775, our forefathers began a revolution against the King of Great Britain in order to protect the rights and liberties of the present citizens of the United States of America. It is most important to study this Country's Declaration of Independence that was adopted on July 4, 1776 and states in pertinent part that:

> "When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.
>
> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their

Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its power in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object, evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. —Such has been the patient sufferance of these Colonies; and such is now the necessity which

constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

"He has refused his Assent to Laws, the most wholesome and necessary for the public good.

. . .

"He has called together legislative bodies . . . for the sole purpose of fatiguing them into compliance with his measures.

. . .

"He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws of Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.

"He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.

"He has made Judges dependent on his Will alone, for the tenure of their offices, and the

amount and payment of their salaries.

"He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our People, and eat out their substance.

"He has kept among us, in times of peace, Standing Armies without the Consent of our legislature.

"He has affected to render the Military independent of and superior to the Civil Power.

"He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation; For quartering large bodies of armed troops among us; For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the inhabitants of these States; For cutting off our Trade with all parts of the world, For imposing taxes on us without our Consent; For depriving us in many cases, of the benefits of Trial by Jury . . .

. . .

"He is at this time transporting large armies of foreign mercenaries to

> compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.
>
> . . .
>
> "He has excited domestic insurrections amongst us . . . We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us . . . We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity . . .
>
> ". . . And for the support of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor."

And now over two hundred years later, have we come full circle? Note that on page 55 of the Brief for Appellant filed before the First Circuit, petitioner asked the following question:

> "Have we now come full circle wherein the revolution fought so bravely by our forefathers was for naught in that we are now exposed to the tyranny that our forefathers gave up their lives to stop?"

The undersigned respectfully asks this Supreme Court to reflect upon the words of our forefathers. Does this Supreme Court accept that the rich and connected do not seem to have enough time and money for the poor and unconnected? Could the "Empire of the United States of America" be substituted for the "King of Great Britain"? Instead of violating the fundamental rights of the undersigned and his children, should this Supreme Court stop and reflect upon the damage caused to the undersigned and his children? Should this Supreme Court and the respondents give any thought to the above-quoted words while denying the undersigned any recovery for the damages caused by their actions and inactions? Whatever happen to the "sacred Honor" our forefathers pledged to their follow citizens of the United States of America?

While the undersigned believes that the facts of this matter justify a revolution, the undersigned appreciates that this Supreme Court has the power to rectify the wrongs committed by the lower courts and the respondents. In the instant case, this Supreme Court should rule that an unmarried father has a "constitutionally protected right" to the "'companionship, care, custody, and management' of 'the children he has sired and raised'". See *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 652 (1975); *Stanley* v. *Illinois*, 405

U.S. 645, 651 (1972); *Troxel* v. *Granville*, 530 U.S. 57, 65-66 (2000). Also see *Ram* v. *Rubin*, 118 F.3d 1306, 1310 (9th Cir. 1997). It is clear that an unmarried father has constitutional rights related to his children. The lower courts clearly abused their power in dismissing this action under the guise that a claim for monetary damages was within the domestic relations exception especially when a federal question was presented. Diversity jurisdiction also existed. See *Ankenbrandt* v. *Richards*, 504 U.S. 689 (1992). Note that long ago, Chief Justice Marshall stated in *Cohen* v. *Virginia*, 19 U.S. 264, 404 (1821) that:

> "'. . .We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution . . . .'"

The *Rooker-Feldman* Doctrine

As this Supreme Court is well aware, this Court clarified the *Rooker-Feldman* doctrine in *Exxon Mobil Corp.* v. *Saudi Basic Industries*, 544 U.S. 280, 125 S.Ct. 1517, 1527 (2005):

> ". . . The Full Faith and Credit Act, 28 U.S.C. § 1738, originally enacted in 1790, ch. 11, 1 Stat. 122, requires the federal court to 'give the same preclusive effect to a state-court judgment as another court of that State would give.' (Citations omitted.) Preclusion, of

> course, is not a jurisdictional matter. See Fed. Rule Civ. Proc. 8(c) (listing res judicata as an affirmative defense)
>
> . . .
>
> "Nor does § 1257 stop a district court from exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court. If a federal plaintiff 'present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party . . ., then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion.'" (Citations omitted.)

Thus, pursuant to the above-quoted language, it is clear that the lower courts should not have ruled that the instant action should have been dismissed. With all due respect to the lower courts, Mitrano states the above-quoted language means that the lower courts cannot in essence throw the instant action out of court on the basis of lack of subject-matter jurisdiction. The *Rooker-Feldman* doctrine is clearly not to be used as a vehicle for denying justice. Furthermore, under the principles of the doctrines of claim preclusion and issue preclusion, Mitrano is not precluded from filing the instant action against the respondents for interfering with Mitrano's rights. Also see *Verizon Md. Inc.* v. *Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 644 n.3 (2002) ("The *Rooker-Feldman* doctrine merely recognizes that 28

U.S.C. § 1331 is a grant of original jurisdiction, and does not authorize district courts to exercise appellate jurisdiction over state-court judgments.") and The Restatement of the Law (Second) § 95, comment g (1971) (amended 1988).

Arguendo, even if the logic of *Exxon Mobil Corp.* v. *Saudi Basic Industries*, 544 U.S. 280, 125 S.Ct. 1517 (2005) did not apply to this action, because the underlying custody order from the State of New Hampshire is void, the *Rooker-Feldman* doctrine would not preclude the petitioner from proceeding with his present civil rights actions. See *Elliott* v. *Peirsol's Lessee*, 26 U.S. 328, 340 (1828) ("But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void"); and, *Thompson* v. *Tolmie*, 27 U.S. 157, 169 (1829). Also see *In re James*, 940 F.2d 46, 52 (3rd Cir. 1991). Also see *In re Gruntz*, 202 F.3d 1074, 1083 n.9 (9th Cir. 2000) wherein the court stated that the "'*Rooker-Feldman* doctrine does not preclude a collateral attack of state court proceedings or judgments in the context of an appeal involving an exclusive federal question'" and that the court further stated *In re Gruntz*, 202 F.3d at 1087:

> ". . . Accordingly, the *Rooker-Feldman* doctrine does not render a state court judgment modifying the automatic stay binding on a bankruptcy court. Thus, if it proceeds without obtaining bankruptcy court permission, a state court risks having its final judgment declared void . . . ."

While the above arises from a case involving bankruptcy law, the legal principles are applicable to the instant case. The federal law (28 U.S.C. § 1738A) pre-empts the state law in analyzing the instant action. This means that even if the district court (Lebanon, New Hampshire) in the State of New Hampshire makes a ruling that violates 28 U.S.C. § 1738A, it does not matter if the courts in the State of Vermont and/or the Commonwealth of Virginia agree with said district court in the State of New Hampshire, the federal law stated in 28 U.S.C. § 1738A supercedes any conflicting state court decisions. Because said district court in the State of New Hampshire is only a court of limited and inferior jurisdiction, its decisions and/or rulings made when 28 U.S.C. § 1738A clearly states that said district court in the State of New Hampshire does not have jurisdiction are void. As a result of said district court in the State of New Hampshire issuing decisions and/or rulings that are void, it does not matter whether the courts in the State of Vermont and/or Commonwealth of Virginia state that the same are not void. A void judgment cannot be resurrected by the courts in the State of Vermont and/or Commonwealth of Virginia; a void judgment stays void. One state cannot through the "Bootstrap Principle" bootstrap another state's void judgment into a valid judgment. See 53 Va. Law Rev. 1241, 1247 (1967), *The Bootstrap Principle,* wherein it is stated:

> ". . . A court does not have power to determine its own jurisdiction merely because the Supreme Court wishes it

> to be so; it has that power only if the legislature or constitution 'wishes' it to be so . . .
>
> ". . . The legislature might not intend a court of inferior jurisdiction to have the power to determine its own jurisdiction . . . ."

Thus, any attempt by other states to in essence "double bootstrap" the void judgment of the state court of New Hampshire into any form of legitimacy should not be allowed by this Supreme Court. Also see Restatement, Second, Judgments (1982) § 11, comment b, and § 12, comment e.

In *Thompson* v. *Whitman*, 85 U.S. 457, 469 (1873), this Supreme Court stated in a case filed in federal court in the State of New York challenging the subject-matter jurisdiction of justices of the peace in a State of New Jersey state court action that:

> "On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself."

Thus, a reading of *Thompson* v. *Whitman*, clearly supports the father's position that a void judgment from the state courts of the State of New Hampshire may be attacked. Again, an important fact is that the state court in the State

of New Hampshire in the instant case was a court of limited and inferior authority. See *State* v. *Flynn*, 110 N.H. 451, 453, 272 A.2d 591, 593 (1970) and *Kiluk* v. *Potter*, 133 N.H. 67, 68-70, 572 A.2d 1157, 1158 (1990).

In *Galpin* v. *Page*, 85 U.S. 350, 365-366 (1873) which was decided in the same year as *Thompson* v. *Whitman*, this Supreme Court further explained that there is a different standard applied when a court of general jurisdiction makes a determination with respect to its jurisdiction as opposed to a court of limited and inferior authority such the subject state court in the State of New Hampshire and stated:

> ". . . The rule is different with respect to courts of special and limited authority; as to them there is no presumption of law in favor of their jurisdiction; that must affirmatively appear by sufficient evidence or proper averment in the record, or their judgments will be deemed void on their face."

Also see *Kalb* v. *Feuerstein*, 308 U.S. 433, 439 (1940) ("The States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land." (Footnote omitted.)). In the footnote numbered 12 from the case *Kalb* v. *Feuerstein*, 308 U.S. 433 (1940), the Supreme Court explained that the issue of whether a state court decision is void ab initio arises from cases unrelated to bankruptcy. Also see *Moore* v. *Dempsey*, 261 U.S. 86 (1923); *Johnson* v. *Zerbst*, 304 U.S. 458, 468 (1938) ("If this requirement of

the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed."); and, *Frank* v. *Mangum*, 237 U.S. 309, 327 (1915) wherein the Supreme Court stated:

> ". . .[A]bsolutely void for want of jurisdiction in the court that pronounced it, either because such jurisdiction was absent at the beginning, or because it was lost in the course of the proceedings . . . ."

Also see *Durfee* v. *Duke*, 375 U.S. 106, 110, 114 (1963), for a discussion of the "rule of finality of jurisdictional determinations" with respect to courts of general jurisdiction (as opposed to courts of special and limited jurisdiction); and, *State* v. *Bushoug*, 109 N.E.2d 692, 694, 695 (Ohio 1951).

Note that in *Sherrer* v. *Sherrer*, 334 U.S. 343, 357-358 (1948), Justice Frankfurter of this Supreme Court stated in an dissenting opinion that:

> "It would certainly have been easier if from the beginning the Full Faith and Credit Clause had been construed to mean that the assumption of jurisdiction by the courts of a State would be conclusive, so that every other State would have to respect it. But such certainly has not been the law since 1873. *Thompson v. Whitman*, 18 Wall. 457, 21 L.Ed. 897 . . . ."

Also see *Grignon's Lessee* v. *Astor*, 43 U.S. 319, 341 (1844) ("That applies to 'courts of special and limited jurisdiction, which are created on such

principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction"); and, *McCormick* v. *Sullivant*, 23 U.S. 192, 199-200 (1825), ("inferior Courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded").

Thus, this Supreme Court has ruled that "courts of a special and limited jurisdiction" "must show their jurisdiction" or "their judgments, taken alone, are entirely disregarded". In other words, if a court (such as the subject New Hampshire state court) is of special and limited jurisdiction, its judgment is a nullity if the said court does not have jurisdiction. Also see *Coleman Bros. Corp.* v. *City of Franklin*, 58 F.Supp. 551, 554 (N.H. 1945) wherein the court stated:

> "The want of jurisdiction in any tribunal renders its proceedings void and when the want of jurisdiction is shown by the record and proceedings themselves, it may be taken advantage of at any time."

Also see *Patterson* v. *Patterson*, 306 F.3d 1156, 1159 (1st Cir. 2002) ("In New Hampshire, '[t]he probate court is not a court of general jurisdiction'"); and, *State* v. *Moquin*, 105 N.H. 9, 13, 191 A.2d 541, 544-545 (1963) where the dissent noted in part that:

> "Unlike the district courts of Massachusetts which are courts of 'general and superior jurisdiction' (citation omitted) . . . the municipal

> courts of New Hampshire have limited jurisdiction . . . ."

Thus, the *Rooker-Feldman* doctrine also does not apply because of a void judgment by the state court in the State of New Hampshire. In order to understand the basis of this exception, it is most important to understand that any decisions from the state courts in the State of New Hampshire related to the subject children are void as a matter of law. As this Supreme Court is well aware, lack of jurisdiction over the subject-matter cannot be waived. Lack of jurisdiction over the subject-matter cannot even be stipulated to by willing adverse parties to an action. Accordingly, the father contends friendly states such as the State of Vermont and/or the Commonwealth of Virginia cannot dictate and/or rule and/or suggest that the subject court in the State of New Hampshire had subject-matter jurisdiction when, in fact, said New Hampshire court did not have subject-matter jurisdiction.

In order to properly analyze the issue of said void judgment, it is necessary venture into the maze of facts. By way of background, on or before October 1, 2000, Kelly moved into the State of Vermont. In accordance with an existing Virginia custody order, beginning since at least October 6, 2000, the subject children had lived with Kelly in Vermont from at least 6:00 P.M. on Friday, October 6, 2000 until school started at approximately 8:00 A.M. on Monday, October 9, 2000 and from 6:00 P.M. on Friday, October 13, 2000 until school started at approximately 8:00 A.M. on Monday, October 16, 2000. Accordingly, when Kelly and Warshell filed a petition to modify

a custody order in New Hampshire on October 16, 2000 (and prior thereto), the children were living in both Vermont and New Hampshire.

Said custody Order of the Circuit Court of Fairfax County, Virginia states in part that the parties "shall have joint physical and legal custody of their minor children". Thus, while the mother was exercising her joint physical and legal custody of their minor children and living in Vermont, said minor children were living in Vermont. Because Kelly was living with the subject children in Vermont in October 2000 prior to the filing by the mother of her Ex Parte Petition to Bring Cause Forward and Modify on October 16, 2000, the State of New Hampshire was not a "home State" as defined by 28 U.S.C. 1738A(b)(4) on October 16, 2000. Accordingly, it is clear that the State of New Hampshire was not a "home State" of the children "on the date of the commencement of the proceeding". Also see 28 U.S.C. § 1738A(c)(2)(A)(i).

The father left the State of New Hampshire by the end of day of December 20, 2000. There was no contestant (a "contestant" is defined as "a person, including a parent or grandparent, who claims a right to custody or visitation of a child") living in the State of New Hampshire at the end of day of December 20, 2000. The father's daughter, Christina, had been unlawfully living with her mother in the State of Vermont. The sons, Peter and Christopher, were living in the Commonwealth of Virginia with their father until Kelly with the assistance of Philips unlawfully took said boys from the Commonwealth of Virginia to the State of Vermont under Kelly's

right of visitation and failed to return said boys according to the custody Order of the Circuit Court of Fairfax County, Virginia. Accordingly, after December 20, 2000, the State of New Hampshire no longer could even be considered a "home State" to pursuant 28 U.S.C. § 1738A(c)(2)(A)(ii) because no one was left in the State of New Hampshire.

Thus, any orders issued by the State of New Hampshire after December 20, 2000 are clearly void for lack of subject-matter jurisdiction. Title 28 U.S.C. § 1738A(c)(2)(A)(ii) requires that "a contestant continues to live in such State".

By and through violations of 28 U.S.C. § 1738A by the various States and the erroneous interpretations of 28 U.S.C. § 1738A by the various state courts, Kelly has denied the father his right to even see his youngest son since January 5, 2001 up to at least the date of the filing of the instant petition for writ of certiorari. In summary, Kelly, Warshell, Martin, Pletcher and Cyr first violated 28 U.S.C. § 1738A(e) by obtaining an ex parte order on October 16, 2000 that in effect took away the father's daughter. Thereafter, on January 3, 2001, the defendants Kelly, Warshell and Martin again violated 28 U.S.C. § 1738A(e) by obtaining another an ex parte order that in effect took away Mitrano's two sons. This ex parte order was also issued in the State of New Hampshire after the State of New Hampshire no longer had subject-matter jurisdiction.

There is no dispute by and through the custody order of the Circuit Court of Fairfax County, Virginia, that the Commonwealth of

Virginia "made a child custody or visitation determination" consistent "with the provisions of" 28 U.S.C. § 1738A. Section 20-108 of the Code of Virginia provides that the Commonwealth of Virginia shall continue to have jurisdiction over the custody order of the Circuit Court of Fairfax County, Virginia. The father currently is a resident of the Commonwealth of Virginia. The children's paternal grandparents, who are contestants, have been residents of the Commonwealth of Virginia since 1972. The Commonwealth of Virginia has continuing jurisdiction pursuant to 28 U.S.C. §§ 1738A(c)(2)(E) and 1738A(d).

The father therefore contends that the Commonwealth of Virginia had and has continuing jurisdiction based upon the father's residence in the Commonwealth of Virginia and/or the paternal grandparents' residence in the Commonwealth of Virginia. See the discussions about the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) contained in 32 Family Law Quarterly 267, 342 (1998), wherein it is stated with reference to said Uniform Child-Custody Jurisdiction and Enforcement Act "that a remaining grandparent . . . should not suffice to confer exclusive, continuing jurisdiction". Contrary to said UCCJEA, 28 U.S.C. § 1738A clearly provides that a remaining grandparent does in fact suffice to confer exclusive, continuing jurisdiction.

Another case discussing this issue is *Clarke* v. *Clarke*, 126 N.H. 753, 755, 758, 496 A.2d 361, 363, 365 (1985), wherein the court stated:

> "Critical to our analysis of the issue of jurisdiction presented here is the recognition that this case involves modification of an existing custody order and not formulation of an initial decree. (Citations omitted.)
>
> . . .
>
> "Unless there has been a final order by an out-of-state court declining jurisdiction to modify its custody decree, the courts of New Hampshire will not assume jurisdiction to modify such a decree."

In addition to the court in the State of New Hampshire not following the above-quoted language from its own Supreme Court of New Hampshire, said court also ignored the language in *Howard* v. *Howard*, 124 N.H. 267, 273-274, 469 A.2d 1318, 1322 (1983) that temporary changes after a permanent change are not to granted absent exceptional cases.

Thus, it is clear that New Hampshire was not a "home State" on the dates that Kelly filed the petitions to modify the custody order from the Commonwealth of Virginia because the children had been living in Vermont part of the time with Kelly prior to the filing of the petitions. See *Neger* v. *Neger*, 93 N.J. 15, 32-33, 459 A.2d 628, 637-638 (1983); *Johnson* v. *Johnson*, 26 Va. App. 135, 149, 493 S.E.2d 668, 675 (1997); and, *St. Andrie* v. *St. Andrie*, 473 So.2d 140, 144 (La. 1985) ("the child was in fact shuttled back and forth between Georgia and Louisiana . . . Therefore, it is clear that the child has no 'home state'."). Also see 45

Hastings L.J. 1329, 1344 (July 1994) ("A child in a joint custody situation might have two established homes.") and *Matter of Adoption of Child by T.W.C.*, 636 A.2d 1083, 1088 (N.J. 1994) ("The jurisdictional requirements of the PKPA, of course, preempt those of the UCCJA").

Because the State of New Hampshire was not a "home State" on the dates the petitions were filed by the mother, the interpretation of the following language contained in 28 U.S.C. § 1738A(c)(2)(A) is critical:

> "(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;"

Note that in interpreting the language "and a contestant continues to live in such State", this Court must also consider the statute as a whole. Note that the language is different than the words "on the date of the commencement of the proceeding" that are in the beginning of above-quoted language of 28 U.S.C. § 1738A(c)(2)(A). Also note the difference in words contained in 28 U.S.C. § 1738A(d) that "such State remains the residence of the child or of any contestant". Thus in interpreting the language "and a contestant continues to live in such State", this Court should find that the plain language of said words means

that the State of New Hampshire no longer had jurisdiction when all the contestants stopped living in the State of New Hampshire. In the *Matter of Guardianship of Walling*, 727 P.2d 586, 590 (Okl. 1986), the court discussed the language stated above and stated:

> "Paragraph 1.a also does not apply because the children were not in the state at the time the commencement of the proceeding. Furthermore, paragraph 1.b is not applicable because of the requirement of having a 'person acting as parent' continued to live in the state . . ."

Note that in discussions about the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) contained in 32 Family Law Quarterly 267, 343 (1998), it is stated with reference to said Uniform Child-Custody Jurisdiction and Enforcement Act that:

> "If State A had jurisdiction under this Section [UCCJEA] at the time a modification proceeding was commenced there, it would not be lost by all parties moving out of the state prior to the conclusion of proceeding . . . ."

In comparison, the language of 28 U.S.C. § 1738A provides that jurisdiction is divested by all parties moving out of the state prior to the conclusion of the proceedings under 28 U.S.C. § 1738A(c)(2)(A)(ii). Also note *Kalb* v. *Feuerstein*, 308 U.S. 433, 438-439 (1940) wherein this

Supreme Court discussed the concept of a state court being divested of jurisdiction.

Accordingly, any orders issued by the State of New Hampshire after December 20, 2000 would be void for lack of subject-matter jurisdiction pursuant to 28 U.S.C. § 1738A. *Also see Badwell* v. *Brooks*, 141 N.H. 508, 512, 686 A.2d 1179, 1182 (1996) ("court's jurisdiction to award custody is purely statutory").

The interpretation of 28 U.S.C. § 1738A is a question of law. Note that in *Thompson* v. *Thompson*, 484 U.S. 174 (1988) this Supreme Court ruled that 28 U.S.C. § 1738A is only a full faith and credit statute and does not create a federal right of action. The State of New Hampshire clearly did not have subject-matter jurisdiction to modify the custody order from the Commonwealth of Virginia. See *Eichelberger* v. *Eichelberger*, 2 Va.App. 409, 412, 345 S.E.2d 10, 12 (1986); *Johnson* v. *Johnson*, 26 Va. App. 135, 146, 149, 493 S.E.2d 668, 673, 674 (1997); and, *Mebert* v. *Mebert*, 444 N.Y.S.2d 834, 837 (1981).

Arguendo, even if New Hampshire had jurisdiction under 28 U.S.C. § 1738A (which the father steadfastly denies), the ex parte New Hampshire order dated January 3, 2001 that dealt with the father's sons would be void because no notice whatsoever was given as required under 28 U.S.C. § 1738A. See 28 U.S.C. § 1738A(e). See *Ex Parte Raywood*, 549 So.2d 103, 104 (Ala. 1989) wherein the court stated: "we find that the Louisiana ex parte order was not made consistently with the PKPA and is not entitled to full faith and credit by the courts of Alabama";

also *see Joel M.* v. *Karen M.*, 507 N.Y.S.2d 369, 371 (1986) wherein the court stated:

> "The sole issue presented in this enforcement proceeding is whether or not the Superior Court of the State of New Hampshire in making the ex parte temporary order of custody was exercising jurisdiction substantially in conformity with the PKPA and UCCJA. Because neither the respondent-mother nor the respondent-maternal grandmother who has physical custody of the children were afforded any notice whatsoever-much less an opportunity to be heard, this Court holds and determines that the New Hampshire ex parte order dated October 2, 1986 is not entitled to full faith and credit under the PKPA or the UCCJA. (See *Sherry Ann F.* v. *Bennet S.*, 131 Misc.2d 854, 502 N.Y.S.2d 383 (Fam.Ct., Scho.Co., 1986))."

Another reason not to recognize the New Hampshire orders are that said orders are void because they are the result of sham proceedings in that the very least there is a willful failure of the Lebanon Family Division to follow the controlling law. The Lebanon Family Division in the State of New Hampshire refuses to recognize the father's right to basic due process under the constitutions of the United States of America and the State of New Hampshire. See *Moore* v. *Dempsey*, 261 U.S. 86, 91 (1923) ("whole proceeding is a mask"). Also note that Mitrano

had no right of appeal from the New Hampshire state court judgment. See *Lynk* v. *LaPorte Superior Court No. 2*, 789 F.2d 554, 565 (7th Cir. 1986) wherein the court stated:

> ". . . [I]t seems inconceivable for example that due process would be interpreted today to allow a state to execute a criminal defendant without giving him any right to appeal from his conviction and sentence. Perhaps it is only a little less inconceivable that a state would be allowed to deny a person a divorce to which he was entitled as a matter of substantive right, on the basis of an unappealable decision of a judge of its divorce court . . . ."

The bottom line is that the petitioner has clearly stated exceptions to the *Rooker-Feldman* doctrine which should have prevented dismissal on the basis of lack of subject-matter jurisdiction by the lower courts.

With reference to respondents, Ross and Wiggin & Nourie, the lower courts clearly misapplied the standards for granting judgment on the pleadings. See *Gulf Coast Bank & Trust Co.* v. *Reder*, 355 F.3d 35, 37 (1st Cir. 2004).

This Supreme Court should review the actions of the lower courts. As this Supreme Court stated in *Mitchum* v. *Foster*, 407 U.S. 225, 240-241 (1972):

> "It is clear from the legislative debates surrounding passage of § 1983's predecessor that the Act was intended to enforce the provisions of

> the Fourteenth Amendment 'against State action . . .
>
> "'. . . Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired.' . . . And Representative Perry concluded: 'Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it . . . **Among the most dangerous things an injured party can do is to appeal to justice.**' . . ." (Footnote omitted.) (Bold emphasis added.)

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

Peter Paul Mitrano
Pro se[1]
4912 Oakcrest Drive
Fairfax, Virginia 22030

Petitioner

Dated: March 9, 2006.

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1. The petitioner, Peter Paul Mitrano, is a member of the Bar of this Court and other courts.

APPENDIX

United States Court of Appeals
For the First Circuit

No. 04-1784

PETER PAUL MITRANO,

Plaintiff, Appellant,

v.

ELAINE R. WARSHELL, ET AL.

Defendants, Appellees,

L. JONATHAN ROSS AND WIGGIN & NOURIE, P.A.,

Defendants,

No. 04-2230

PETER PAUL MITRANO,

Plaintiff, Appellant,

v.

ELAINE R. WARSHELL, ET AL.,

Defendants, Appellees.

Before

Boudin, Chief Judge,
Lynch, and Lipez, Circuit Judges.

JUDGMENT

Entered: September 16, 2005

We have carefully, reviewed the record in this case, including the briefs of the parties. Essentially for the reasons given in its order, dated May 7, 2004, we agree with the district that plaintiff's civil rights claim are barred by the Rooker-Feldman doctrine. We add only that the doctrine bars plaintiff's claims even if, as he alleges, the state court lacked jurisdiction to issue its custody order. See Doe v. Mann, 415 F.3d 1038, 1042-43 (9th Cir 2005). We affirm the dismissal of plaintiff's claim against his former counsel essentially for the reasons given by the district court in its order, dated June 21, 2004.

Affirmed.

By the Court:

Richard Cushing Donovan,
Clerk.

MARGARET CARTER

By: _____
Chief Deputy Clerk.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Peter Paul Mitrano

v. Civil Action No.C.03-469-JD

Elaine R. Warshell, et al

JUDGMENT

Judgment is hereby entered in accordance with the orders dated May 7, 2004 and June 21, 2004, by U.S. District Judge Joseph A. Diclerico, Jr., and costs, if appropriate.

By the Court,

James R. Starr, Clerk

June 22, 2004

UNITED STATES DISTRICT COURT FOR THE
UNITED DISTRICT OF NEW HAMPSHIRE

Peter Paul Mitrano

v. Civil No. 03-469-JD

Elaine R. Warshell, et al.

ORDER

Peter Paul Mitrano, proceeding pro se, brings an action against his former wife, Virginia Kelly; Kelly's brother-in-law, William D. Phillips; judges; lawyers and a law firm; and his children's former guardian ad litem.[1] Mitrano's claims arise from his unsuccessful dispute with Kelly about the custody of their three children. The defendants, other than Mitrano's former counsel and law firm, have moved to dismiss the claims brought against them.[2]

Mitrano is extremely litigious and has been warned against bringing frivolous claims in this suit. See Order, March 2, 2004 (document no. 13). He brought the same or similar claims arising from the same circumstances against the

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[1]Mitrano is an attorney who is apparently a member of the New Hampshire and Virginia Bars.

[2]Defendants L. Jonathan Ross and Wiggin & Nourie, P.A., have not filed a motion at this time.

same defendants in a suit filed in Virginia. See Mitrano v. Warshell, Civil No. 03-1298 (E.D. Va. Apr. 9, 2004). That action has been dismissed due to a lack of subject matter and personal jurisdiction and "because Defendants' motions and arguments persuasively argue that this Complaint fails to state a claim for relief under Fed. R. Civ. P. 12(b)(6) and that this complaint is frivolous." Id. at *16. Despite his lack of success and clear notice that his claims lack merit, Mitrano continues to press his claims here.

Discussion

In his complaint, Mitrano asserts that his action is brought pursuant to 42 U.S.C. § 1983 but he alleges only state law claims against the defendants. He claims jurisdiction under both 28 U.S.C. §§ 1331 and 1332. Pertinent to the present motions, Mitrano alleges tort claims of interfering with his right to raise children, infliction of emotional distress, invasion of privacy, and conspiracy all arising from the defendants' various roles in the custody proceedings and return of the Mitrano children to their mother's custody. He seeks damages "in an amount of $50,000,000.00 plus $50,000.00 per day from October 15, 2003 until each and every child is returned to Mitrano." The moving defendants raise issues of subject matter jurisdiction, personal jurisdiction, issue and claim preclusion, and immunity, along with arguments that the complaint fails to state a claim.

The court addresses the issue of subject

matter jurisdiction first.[3] Federal court subject matter jurisdiction is limited by an "exception that prohibits federal courts from issuing or altering 'divorce, alimony, and child custody decrees.'" Mandel v. Town of Orleans, 326 F.3d 267, 271 (1st Cir. 2003) (quoting Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992)). "The aim of the exception is to keep federal courts from meddling in a realm that is peculiarly delicate, that is governed by state law and institutions (e.g. family courts), and in which inter-court conflicts in policy or decrees should be kept to an absolute minimum." Dunn v. Cometa, 238 F.3d 38, 41 .(1st Cir. 2001). When the domestic relations exception does not apply, federal courts may decide to abstain from deciding cases involving issues of divorce, alimony, or custody under certain limited circumstances. Ankenbrandt., 504 U.S. at 705.

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[3]Whether or not the jurisdictional issues raised here necessarily must be resolved before otherwise dispositive substantive issues could be addressed, this order of adjudication is preferable in this case. See Restoration Preservation Masonry, Inc. v. Grove Eur. LTD, 325 F.3d 54, 59-60 (1st Cir. 2003). In addition, however, the claims against the judicial defendants, Hon. Larry B. Pletcher, Hon. John Peter Cyr, Hon. Willard G. Martin, Jr., and Deborah A. Blake, all of which seek money damages, are barred by their absolute immunity. See, e.a., Mireles v. Waco, 502 U.S. 9 (1991); Cok v. Cosentino, 876 F.2d 1, 3 (1st Cir. 1989); Mitrano v. Martin, 2002 WL 122384, at *2 (D.N.H. Jan. 22, 2002).

In the substantially similar case Mitrano brought in the Eastern District of Virginia, the court reviewed the underlying state court rulings pertaining to custody of the Mitrano children and held that it lacked diversity jurisdiction based on the domestic relations exception because child custody was central to Mitrano's claims. Mitrano, Civil No. 03-1298-A, at *2-*4 & *15. The court noted in particular that Mitrano sought damages until his children were returned to his custody. Id. at *15. Mitrano's claims against the moving defendants in this case, although couched in the language of tort claims, also are based on his dispute about their custody, and he seeks damages until the children are returned to him. In essence, Mitrano asks this court to issue an order that would modify the custody orders issued by the New Hampshire court. Therefore, the domestic relations exception applies to preclude subject matter jurisdiction to address Mitrano's claims against the defendants who have moved to dismiss the claims against them.

In addition, this case implicates the jurisdictional limit imposed by the Rooker-Feldman doctrine. See Mandel, 326 F.3d at 271.

> "The Rooker-Feldman doctrine prohibits federal district and circuit courts from reviewing state court judgments. Where a party did not actually present its federal claims in state court, Rooker-Feldman, forecloses lower federal court jurisdiction over claims that are inextricably intertwined with the claims adjudicated in a state court. A

> federal claim is inextricably intertwined with the state-court claims if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it."

Rosenfeld v. Eav, 346 F.3d 11, 18-19 (1st Cir. 2003) (quoting Sheehan v. Marr, 207 F.3d 35, 39-40 (1st Cir. 2000)); see also, Mitrano, 2002 WL 122384, at *2. Further, the doctrine applies even where a plaintiff claims procedural or constitutional infirmities in the underlying proceedings. Mandel, 326 F.3d at 272, n.4; Youna v. Murphy, 90 F.3d 1225, 1231 (7th Cir. 1996). The Rooker-Feldman,"doctrine is widely used by the federal court to prevent end-runs around state judgments." Id. at 271.

Pertinent to Mitrano's claims here, the Grafton County (New Hampshire) Family Division Court granted Virginia Kelly, Mitrano's former wife, sole custody of their daughter on December 28, 2000, and granted Kelly temporary custody of their two sons on January 3, 2001. After litigation by both Mitrano and Kelly in Fairfax Circuit Court, Virginia, that court ruled that New Hampshire had jurisdiction over the custody of their two sons. Kelly and her brother-in-law then retrieved her sons and returned them to New Hampshire. On January 11, 2001, the New Hampshire court denied Mitrano's request for visitation and found him in contempt of court for taking his two minor sons from New Hampshire to Virginia. Mitrano's subsequent litigation to avoid the custody and contempt orders of the New Hampshire court has been entirely unsuccessful.

Mitrano's claims in this suit against the moving defendants are based on his allegations that he was "wrongfully deprived of the services, care, comfort, companionship and society of [his] three children," that the defendants acted willfully or in "deliberate disregard for [his] rights to physical custody of his children and to maintain the integrity of his family." Count I. Mitrano demands money damages for each claim including "$50,000.00 per day from October 15, 2003 until each and every child is returned to Mitrano." Complaint, Counts I - IV. As such, Mitrano seeks a ruling by this court that the New Hampshire state court's custody decisions awarding custody of the children to Kelly were wrongly decided. This court lacks jurisdiction to make that determination.

Because the court lacks subject matter jurisdiction to consider Mitrano's claims against the moving defendants, it is not necessary to consider the myriad of other issues raised in support of their motions to dismiss.

Some of the moving defendants have also requested an award of reasonable attorney's fees that they have incurred in responding to Mitrano's claims in this case. Whether Mitrano's claims are construed as federal claims under § 1983 or state law claims, attorney's fees and costs may be awarded in appropriate circumstances to private prevailing parties, including defendants, who are represented by counsel. See 42 U.S.C. § 1988; Bercovitch v. Baldwin Sch., Inc., 191 F.3d 8, 10 (1st Cir. 1999); Schneider v. Colegio de Abogados de P.R., 187 F.3d 30, 39 (1st Cir. 1999) (Lipez, J., concurring); Sys. Mgmt., Inc. v. Loiselle, 154 F. Supp. 2d 195, 204 (D. Mass. 2001);

Keenan v. Fearon, 130 N.H. 494, 501-02 (1988). Those defendants who believe they are entitled to an award of reasonable attorneys' fees under the applicable law and based on the resolution of the motions addressed in this order may file a motion and a supporting memorandum along with all of the necessary supporting documentation within thirty days of the date of this order. The plaintiff will then have fifteen days to respond to any such motion filed. No fees will be awarded for the time expended in filing a motion for fees.

Conclusion

For the foregoing reasons, the defendants' motions to dismiss (documents no. 14, 17, 18, 29, 31, and 39) are granted, due to a lack of subject matter jurisdiction except as to their requests for an award of attorneys' fees, which is denied without prejudice to move for such an award as is provided in this order. Defendant Davis's motion to notify the court of the Virginia Federal Court decision (document no. 42) is also granted.

The defendants remaining in this case are L. Jonathan Ross and Wiggin & Nourie, P.A.

SO ORDERED.

Joseph A. DiClerico, Jr.
United States District Judge

May 7, 2004

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Peter Paul Mitrano

v. Civil No. 03-469-JD

L. Jonathan Ross, et al.

ORDER

Peter Paul Mitrano brought an action against a host of defendants who were involved in his custody dispute with his former wife. The only remaining defendants are Mitrano's former lawyer, L. Jonathan Ross, and Ross's law firm, Wiggin &,Nourie, P.A. Ross and Wiggin & Nourie move to dismiss the claims against them.

Standard of Review

When, as here, the defendants have filed an answer, a motion to dismiss is properly considered as a motion for judgment on the pleadings. "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). When considering a motion for judgment on the pleadings, the "court must accept all of the nonmoving party's well-pleaded factual averments as true and draw all reasonable inferences in her favor." Feliciano v. Rhode Island, 160 F.3d 780,

788 (1st Cir. 1998). Judgment on the pleadings is not appropriate "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief." Santiago de Castro v. Morales Medina, 943 F.2d 129, 130 (1st Cir. 1991) (quoting Rivera-Gomez v. De Castro, 843 F.2d 631, 635 (1st Cir. 1988)).

The defendants have submitted letters to Mitrano that constitute the parties' agreement and notice of the withdrawal and a copy of the decision of Judge Lee in the Eastern District of Virginia which addresses the same claims brought against these defendants there. These materials may properly be considered in the context of the defendants motion because the letters are central to Mitrano's claim and the authenticity of the court's decision is not disputed. Prisma Zona ExDloratoria De P.R. v. Calderon, 310 F.3d 1, 2 (1st Cir. 2002).

Discussion

Mitrano alleges claims of breach of contract, breach of the duty of good faith and fair dealing, breach of fiduciary duty, and legal malpractice against Ross and Wiggin & Nourie. All of the claims arise from Ross's decision to withdraw from representing Mitrano after he ignored Ross's advice and took his children to Virginia. That action led to findings of contempt by the New Hampshire court against Mitrano.

The letter of agreement for representation between Mitrano and Ross provides that Ross and Wiggin & Nourie have the right in their discretion to withdraw from the representation if Mitrano

failed to follow their advice. The notice of withdrawal states that Mitrano acted contrary to Ross's advice in moving to Virginia with his children. Mitrano's complaint confirms both that he moved to Virginia with his children and that he received notice from Ross of the withdrawal of representation.

Therefore, based on the facts presented in the complaint, supplemented by the letters, no breach of contract, breach of the duty of good faith and fair dealing, or breach of a fiduciary duty occurred. Similarly, because Ross and Wiggin & Nourie properly withdrew from representing Mitrano, based on the terms of their agreement, no legal malpractice occurred. Because Mitrano can prove no set of facts that would support his claims against Ross and Wiggin and Nourie, those claims are dismissed.

Conclusion

For the foregoing reasons, the defendants' motion to dismiss (document no. 46) is granted. All claims against L. Jonathan Ross and Wiggin & Nourie, P.A., are dismissed.

SO ORDERED.

Joseph A. DiClerico, Jr.
United States District Judge

June 21, 2004

United States Court of Appeals
For the First Circuit

No. 04-1784
04-2230

PETER PAUL MITRANO,

Plaintiff, Appellant,

v.

ELAINE R. WARSHELL, ET AL.

Defendants, Appellees,

Before

Boudin, Chief Judge,
Torruella, Selya, Lynch,
Lipez and Howard,*
Circuit Judges.

ORDER OF COURT

*Judge Howard is recused and did not participate in the determination of this matter.

Entered: December 13, 2005

The petition for rehearing and/or rehearing en banc is denied.

By the Court:

Richard Cushing Donovan,
Clerk.

MARGARET CARTER

By: _____
Chief Deputy Clerk.